

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

## KHAMSING SITTHIDET AND VIENGXAY SITTHIDET.

## Plaintiffs,

V.

FIRST HORIZON / METLIFE HOME  
LOANS / FIRST TENNESSEE BANK  
(FTB), et al.,

## Defendants.

CASE NO. 12-CV-469-MJP

ORDER GRANTING FIRST  
HORIZON / FIRST TENNESSEE  
BANK (FTB)'S MOTION TO  
DISMISS

This matter comes before the Court on Defendant First Horizon / First Tennessee (FBT)'s (“First Horizon”) motion to dismiss. (Dkt. No. 6.) Having reviewed the motion, Plaintiff’s response (Dkt. No. 9), Defendant’s reply (Dkt. No. 13), and all the related filings, the Court GRANTS Defendant’s motion to dismiss.

## Background

Plaintiffs, Viengxay and Khamsing Sitthidet, commenced this action against First Horizon and several other parties alleging seven causes of action: (1) violations of the Truth in

1 Lending Act (“TILA”), 15 U.S.C. § 1601; (2) violations of the Real Estate Settlement Procedures  
2 Act (“RESPA”), 12 U.S.C. § 2601, et seq.; (3) violations of the Fair Credit Reporting Act  
3 (“FCRA”); (4) violations of the Fair Debt Collection Practices Act (“FDCPA”), (5) violations of  
4 state law under RCW 19.16., et seq.; (6) violations of the Consumer Protection Act (“CPA”); and  
5 (7) fraud.

6 A. Factual Allegations Related to Viengxay Sitthidet’s Loan

7 In October 2001, Viengxay Sitthidet (“Viengxay”) obtained a loan from First Horizon in  
8 order to refinance his home at 1814 West Henry Street, Pasco, Washington. (Dkt. No. 1 at 7.)  
9 (Id.) Viengxay alleges two improprieties with the disclosure of the loan terms. First, Viengxay  
10 expected a fixed interest rate of 5% or 5.5%, but the Defendant “never used any interest rate as  
11 disclosed to him,” and instead used a rate of 8.1% or higher. (Id.) Second, because of the  
12 increased interest rate, Viengxay’s monthly payment was \$76.06 greater than the payment  
13 estimate provided by First Horizon on the TILA disclosure. (Id. at 8.)

14 By January of 2008, Viengxay states that he “knew something was wrong with his loan”  
15 because the principle was decreasing at a slower than expected rate. (Id.) To rid himself of the  
16 loan, he paid it off using his 401k. (Id.) In 2009, he “learned that he was ripped off.” (Id.) To  
17 gain more information about his loan, in May 2011, Viengxay sent a letter to First Horizon  
18 demanding they reproduce his original loan documents. (Dkt. No. 1 at 13.) First Horizon did not  
19 respond to this request. Viengxay then commenced this action with his brother, Khamsing, in  
20 2012. (Id.)

21 B. Factual Allegations Related to Khamsing Sitthidet’s Loan

22 In November 2003, Khamsing Sitthidet (“Khamsing”) acquired a loan from Flagstar  
23 Bank for a piece of real property located at 12405 141<sup>st</sup> Place SE, Renton, Washington. (Dkt. No.  
24

1 at 17.) He alleges there were four defects with the loan disclosures: (1) the documents did not  
2 use Khamsing's legal name; (2) the lender did not pay for the appraisal fee; (3) the loan was  
3 understated; and (4) the lender failed to deliver a Notice of a Consumer's Right to Rescind as  
4 required by TILA. (Id.)

5 In 2005, Flagstar transferred the loan to First Horizon. (Dkt. No. 1 at 17) Khamsing  
6 alleges servicing problems and fraudulent escrow practices began at this time. (Id.) Due to these  
7 concerns, Khamsing notified First Horizon of his intent to rescind his loan in September 2010  
8 and then again on October 4, 2010 through service of a Notice of Loan Rescission on First  
9 Horizon's attorney. (Id. at 18.) First Horizon did not rescind his loan, and instead sold the loan to  
10 another servicer. (Id.) Khamsing charges that this action further violated TILA. He also contends  
11 that First Horizon violated RCW 19.16, et seq., FDCPA, and TILA through the use of threats to  
12 enforce a wrongful debt. (Id.)

13 Khamsing has filed two other actions against First Horizon. First, on April 23, 2010, he  
14 filed a proceeding in the U.S. District Court for the Western District of Washington. The action  
15 was dismissed for a lack of subject matter jurisdiction. Second, on July 9, 2010, Khamsing filed  
16 suit in King County Superior Court, which Khamsing voluntarily dismissed. Khamsing and his  
17 brother Viengxay then filed this action in April 2012.

## Analysis

## A. Standard

20 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
21 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556  
22 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). This entails  
23 “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

1 will not do.” Twombly, 550 U.S. at 570. Instead, “a claim has facial plausibility when the  
2 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
3 defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678.

4 Plaintiffs contend in their reply that the standard is “no set of facts.” (Dkt. No. 9 at 10.)  
5 This law, however, is no longer valid. Iqbal, 556 U.S. at 670.

6 B. TILA

7 Plaintiffs’ claims for rescission and damages under TILA were filed too late and must be  
8 dismissed.

9 When a borrower alleges improper notice of a right to rescission under TILA, the right to  
10 rescission expires three years after the start of the loan transaction or the sale of the property,  
11 whichever occurs first. 15 U.S.C. § 1635(f). In Beach v. Ocwen Federal Bank, the Supreme  
12 Court found that “section 1635(f) completely extinguishes the right of rescission at the end of the  
13 3 year period.” 523 U.S. 410, 412 (1998). Thus, a party has no ability to seek an exception to  
14 the time limit to extend that period. See Miguel v. Country Funding Corp., 309 F.3d 1161, 1164-  
15 65 (9th Cir. 2002).

16 A claim for monetary damages under TILA may be brought within one year of the  
17 occurrence of the violation. 15 U.S.C. §1640(e). Generally, the statute of limitations begins  
18 accruing at the start of the transaction. King v. California, 748 F.2d 910, 915 (9th Cir. 1986).  
19 Yet, in appropriate circumstances, the doctrine of equitable tolling may “suspend the limitations  
20 period until the borrower discovers or had reasonable opportunity to discover the fraud or  
21 nondisclosures that form the basis of the TILA action.” Id. at 914-15.

22 Plaintiffs’ claims for rescission under TILA were filed too late. Viengxay obtained his  
23 loan in 2001 and did not file suit until eleven years later in 2012. (Dkt. No. 1 at 7). Khamsing  
24

1 obtained his loan in 2003 and did not file suit until nine years later. (Dkt. No. 1 at 18.) Both  
2 claims were filed after the three year statutory period, ending the right to rescission.

3 In addition, Plaintiffs' claims for damages under TILA were filed too late. Viengxay  
4 asserts he knew something was wrong with his loan by January 2008. (Dkt. No. 1 at 8.) A year  
5 later, in 2009, he was fully aware of the problems associated with his loan. (*Id.*) He did not file  
6 suit until at least three years later. Similarly, Khamsing was aware of a problem with his loan at  
7 least two years before this action as evidenced by his initial suit against First Horizon in 2010.  
8 (Dkt. No. 6 at 6.) Even if the court considers equitable tolling applies, both claims were still filed  
9 more than one year after Plaintiffs discovered the loan improprieties making Plaintiffs' claims  
10 time-barred.

11 The Court GRANTS Defendant's motion and DISMISSES Plaintiffs' TILA claims in full  
12 with prejudice.

13 C. RESPA

14 Plaintiffs' also filed their claims under RESPA too late.

15 A RESPA claim stemming from improper disclosure of loan terms under section 2605(a)  
16 must be brought within three years of the start of the loan. 12 U.S.C. § 2614. All other claims,  
17 which are laid out in sections 2605, 2607, 2608, are subject to a one-year statute of limitations.  
18 *Id.* Similar to TILA, in certain circumstances, the one-year limitation may be subject to equitable  
19 tolling. Guketlov v. Homekey Mortg., LLC, C09-1265JLR, 2009 WL 3785575, at \*3 (W.D.  
20 Wash. Nov. 9, 2009).

21 Vienxgay's claims under RESPA were filed too late. Viengxay obtained his loan in 2001  
22 and did not file suit until 2012. (Dkt. No. 1 at 7.) His claim under § 2605(a) is not subject to  
23 equitable tolling and was not brought within three years of the consummation of his loan as  
24

1 required by RESPA. In addition, he was aware of a problem with his loan by January 2008, four  
2 years before this suit. (Dkt. No. 1 at 8.) Even if equitable tolling applies, he was aware of the  
3 problem more than one year before filing suit.

4 Khamsing's claims under RESPA were also filed too late. Khamsing obtained his loan in  
5 November 2003 and did not file suit until nine years later in 2012. (Dkt. No. 1 at 18.) His claim  
6 for improper disclosure under § 2605(e) was not brought within 3 years of the consummation of  
7 his loan as required by RESPA. All other claims Khamsing could bring under RESPA are  
8 outside of their one-year limitations period, and his prior suit shows that he was aware of the  
9 improprieties associated with his loan by 2010, more than one year before he filed this suit.

10 The Court GRANTS Defendant's motion and DISMISSES Plaintiffs' RESPA claims  
11 with prejudice.

12 D. FCRA

13 Plaintiffs fail to adequately claim that the actions of First Horizon or any defendant  
14 violated the FCRA. (Dkt. No. 1 at 21.)

15 The FCRA strives to ensure accuracy and fairness in credit reporting, and imposes two  
16 sets of duties on providers of information under 15 U.S.C. §§ 1681s-2(a) and (b). Only 15 U.S.C.  
17 § 1681s-2(b) provides a private right of action for violations of its duties. See Krieg v. Allstate  
18 Fin. Servs., 250 F. App'x 830 (9th Cir. 2007) (unpublished). Before a plaintiff can state a claim  
19 under section 1681s-2(b), he must allege that he provided proper notice to a credit reporting  
20 agency that he disputed the information provided by First Horizon. Id.

21 Plaintiffs' claim under the FCRA fails to meet the prerequisite requirement of properly  
22 notifying a credit reporting agency that they disputed information provided by First Horizon. The  
23 complaint does not allege that the Plaintiffs provided any notice to a credit reporting agency. In  
24

1 fact, their reply indicates that they do not believe they should have to. (Dkt. No. 9 at 15.)

2 Because Plaintiffs failed to fulfill the prerequisite requirements under the FCRA, the Court

3 GRANTS Defendant's motion and DISMISSES Plaintiffs' FCRA claims with prejudice.

4 E. FDCPA

5 Plaintiffs' FDCPA claim was filed too late and is time-barred. An action to enforce  
6 liability may be brought within one year of the date in which the violation occurs. 12 U.S.C. §  
7 1692k(d). The one year period starts when "the plaintiff knows or has reason to know of the  
8 injury which is the basis of the action." Mangum v. Action Collection Serv., Inc., 575 F.3d 935,  
9 940 (9th Cir. 2009) (internal quotations omitted). Here, Viengxay was aware that he possessed a  
10 potential claim by 2008. Furthermore, Khamsing had brought suit by 2010. Both claims were  
11 filed after the one-year statutory period.

12 The Court GRANTS Defendant's motion and DISMISSES Plaintiffs' FDCPA claims  
13 with prejudice.

14 F. CPA

15 Only Vienxgay directly asserts a CPA claim, which was filed too late and is time-barred.  
16 All CPA claims must be filed within four years of the event giving rise to the claim. RCW  
17 19.86.120. His claim stems from events occurring at the origination of the loan, such as the lack  
18 of disclosure of the interest rate. Vienxgay's loan is outside the statutory period as its origination  
19 was in 2001. Thus, Court GRANTS Defendant's motion and DISMISSES Plaintiffs' CPA  
20 claims with prejudice.

21 G. Fraud

22 Both Plaintiffs' claims for fraud are subject to dismissal. Viengxay's claims for fraud  
23 were also filed too late. An action for fraud must be filed within three years of its discovery.  
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1 RCW 4.16.080. Viengxay developed awareness of the fraudulent activity by 2008, and thus, his  
2 claim is one year outside the statutory period and it is time-barred. Khamsing does not state in  
3 the complaint when he became aware of the fraud. Instead it is only known that he filed suit for  
4 the first time in April 2010. While his claim may not be barred by time, he did not plead facts  
5 with enough particularity to satisfy the heightened pleading standard of 9(b). The Court  
6 DISMISSES Vienxgay's claim with prejudice because it was filed too late, and DISMISSES  
7 Khamsing's claim without prejudice because he did not plead fraud with particularity.

8 H. State Law Claims

9 The Defendant also contends it is not a "collection agency" under state law. See RCW  
10 19.16 et. seq. Since property disputes are more properly addressed in state court, the Court  
11 declines to reach this issue. In addition, the Court only had jurisdiction over Plaintiffs' state law  
12 claims because they alleged federal law claims which could satisfy original jurisdiction under 28  
13 U.S.C. § 1331. All the federal claims were filed too late and are dismissed. Thus, the Court does  
14 not have original jurisdiction under 28 U.S.C. § 1331 and Plaintiffs' did not allege diversity  
15 jurisdiction under 28 U.S.C. § 1332. The Court could only have supplemental jurisdiction over  
16 these claims under 28 U.S.C. § 1367. Under 28 U.S.C. § 1367(c) a court may decline jurisdiction  
17 over remaining state law claims "when it has dismissed all claims over which it has original  
18 jurisdiction."

19 The court exercises its discretion and DECLINES supplemental jurisdiction over the  
20 remaining state law claims under RCW 19.16 et. seq. The Court DISMISSES them without  
21 prejudice, but without leave to amend, as it does not have jurisdiction over such claims.

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## Conclusion

2 Plaintiffs' have failed to plead viable federal law claims. Plaintiffs' TILA, RESPA,  
3 FDCPA, and CPA claims are time-barred, as is Vienxgay's fraud claim. Plaintiffs have not met  
4 the prerequisites for the FCRA claim and the Court declines supplemental jurisdiction over the  
5 remaining state law claims. The Court GRANTS Defendant's motion and DISMISSES the case  
6 in full. All pending motions are STRICKEN and the matter shall be closed.

7 The clerk is ordered to provide copies of this order to Plaintiffs and all counsel.

8 Dated this 19th day of June, 2012.

Wesley Belman

Marsha J. Pechman  
United States District Judge